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THE INDIAN RESIDENTIAL SCHOOLS TRUTH AND RECONCILIATION COMMISSION

Julian Walker
Legal and Legislative Affairs Division

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THE INDIAN RESIDENTIAL SCHOOLS TRUTH AND RECONCILIATION COMMISSION: A BACKGROUNDER

INTRODUCTION

In the summer of 2008, Canada established the Indian Residential Schools Truth and Reconciliation Commission (the Commission), which began its work to fulfill a five-year mandate reviewing the history of Canada's Indian Residential Schools. Many Canadians view the creation of the Commission as a historic measure: historic not only in its content, but also in that many Canadians are hoping the Commission will mark a turning point in the relations between the Canadian government and Aboriginal peoples.

The Indian Residential Schools educational system was a cooperative effort between the Canadian government and Christian church organizations that saw perhaps more than 150,000 Aboriginal children taken to boarding schools, miles away from their families, to be "civilized," educated, and converted to Christianity. Though the system formally ended in 1969, several government-run schools remained open until as late as the 1990s. An estimated 70,000–80,000 First Nations, Inuit and Métis residential schools survivors are alive in Canada today.(1) Many stories of mistreatment at residential schools have been and continue to be told in public by these survivors. They depict incidents of sexual, physical and emotional abuse at the hands of the teachers and administrators who were responsible for their care, as well as from their fellow students. As awareness of the harms of the Indian Residential Schools system has grown over the last two decades, survivors have sought justice and reparations from the government and the churches that ran the schools. The Commission forms part of the government's response to promote healing and reconciliation. In a formal apology given on behalf of the Government of Canada to the Indian Residential Schools survivors on 11 June 2008, Prime Minister Stephen Harper referred to the Commission as a "unique opportunity to educate

(1) Office of the Prime Minister, "Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system," News release, Ottawa, 11 June 2008, http://pm.gc.ca/eng/media.asp?id=2149.

all Canadians on the Indian Residential Schools system" and "a positive step in forging a new relationship between Aboriginal peoples and other Canadians."[2]

The Commission has several goals and purposes. It has been designed to provide those affected by the Indian Residential Schools legacy with "a safe, respectful, and culturally appropriate environment in which to share their experiences."[3] It will gather and then share these stories in the hope of educating Canadians about the history of the Indian Residential Schools system and the negative effects of its legacy in Aboriginal communities. The Commission's final report will create an historical account that will form part of our national understanding of the Indian Residential Schools system. The Commission will also provide recommendations to promote the healing of Aboriginal communities and reconciliation between Aboriginal peoples and non-Aboriginal Canadians.[4]

In creating a "truth and reconciliation commission," Canada is joining a growing list of countries that have held similar transitional justice initiatives, such as Argentina, Cambodia, Chile, East Timor, El Salvador, Ghana, Guatemala, Nicaragua, Peru, Poland, Sierra Leone, South Africa, and others. Most of these previous efforts were established after changes in government, or other political or historical transitions, and were mandated to investigate patterns of abuse and violations of human rights during a specific period in a nation's history. The Commission will therefore be watched and discussed not only by Canadians, but also by international commentators and foreign governments. In particular, Americans and Australians, who also have their own legacies with residential schools to confront, will no doubt take an interest in the Commission's proceedings, report and recommendations.

This paper is intended to review the Commission's historical context, to provide an overview of its terms of reference and its purpose, and to discuss certain themes drawn from past truth commissions and other transitional justice initiatives conducted internationally.

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(2) Ibid.

(3) Indian Residential Schools Truth and Reconciliation Commission, *Truth, Healing, Reconciliation*, 18 August 2008, p. 7, http://www.trc-cvr.ca/pdfs/20080818eng.pdf.

(4) Ibid.; and Indian Residential Schools Settlement – Official Court Website, Indian Residential Schools Settlement Agreement, 8 May 2006, Schedule N: Mandate for the Truth and Reconciliation Commission, http://www.residentialschoolsettlement.ca/settlement.html.

PRINCIPLES OF TRANSITIONAL JUSTICE

The origins of transitional justice can be found in the earlier part of the 20th century, when post-war atrocities were investigated by the victors of World Wars I and II. An example is the United Nations War Crimes Commission (the "Nuremburg Trials") created by the Allies to try Nazi war criminals. The end of the war created a need for a process that could bring those guilty of serious war crimes to justice, but that was also flexible enough to handle a situation where such a large number of people had participated in the war. Since then, numerous situations around the world have required non-traditional justice initiatives. For instance, where a political regime has committed human rights violations, or plundered natural resources and capital, or oppressed people to serve its political ambitions, transitional justice seeks to provide a means to promote justice and address the harm caused by these acts once the political opportunity presents itself to review them. Such efforts have included the lustration process in Eastern Europe after the collapse of the communist regimes in the 1990s; the "gacaca," an alternative type of traditional court established in Rwanda after the civil war and genocide there; the ad hoc international criminal tribunals for the Former Yugoslavia and for Rwanda; and truth commissions.

Transitional justice is therefore focussed on the future while it reviews the past. It is an attempt to help a society change from a state where wrongs have gone unaddressed to a state where injustices of the past have been confronted and acknowledged. Most often, this occurs when a state moves from a period of violence and human rights abuses, to a period of social stability and democratic government. It recognizes that conventional court systems may not be suited to address all injustices committed over long periods of time, by large numbers of people, and involving different cultural and social groups. A sense of justice may not always be achieved by simply bringing known human rights abusers before a judge and jury, and therefore non-traditional justice initiatives that are specifically tailored for unique historical circumstances may be required to achieve reconciliation between opposed groups of people.

Most transitional justice initiatives commence with much negotiation and compromise. Nations, governments, political leaders and non-governmental organizations will have to engage in debates concerning: what principles of justice should be followed; how to respect the rights of participants, victims and accused persons; how to write a new national history; what historical events may be open to review; who is to participate and what roles will they have; what is the reconciliation that is hoped for; how to determine what is "truth"; and other philosophical and practical questions.

THE INDIAN RESIDENTIAL SCHOOLS SYSTEM

A. Historical Context

Assimilation policies were adopted by the Canadian government in accordance with prevailing beliefs in the 19th and early 20th centuries that Aboriginal cultures were inferior and incompatible with Euro-Canadian society, and also that Aboriginal peoples were incapable of managing their own affairs.(5) Aboriginal peoples were viewed as "children of the state" who should aspire to adopt English and French ways.(6)

For much of the early part of the European colonization of North America, Aboriginal peoples lived in politically independent groups, or "nations," many of which were, whether as enemies or as allies, recognized as important strategic and trading powers. Europeans sent missionaries amongst them to convert them to Christianity and to "civilize" them, though they remained largely independent until the British and French established themselves across the continent and no longer required their alliances with Aboriginal peoples. Then, the relationship changed.

The opinion that dominated the policies of Canada's new government after Confederation was that by isolating Aboriginal peoples on reserves, government agents could gradually prepare them for assimilation into the dominant society, rather than permitting them to continue their traditional ways and maintaining self-government or directly giving them the vote.(7) The government was optimistic about the possibility that Aboriginal peoples might gradually be "reclaimed from their savage state," though as one government commissioner of the time stated, "any hopes of raising the Indians as a body to the social or political level of their

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(5) Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, October 1996, Indian and Northern Affairs Canada, Vol. 1, Chap. 8, http://www.ainc-inac.gc.ca/ap/rrc-eng.asp.

(6) Richard Bartlett, "Citizens Minus: Indians and the Right to Vote," *Saskatchewan Law Review*, Vol. 44, 1980, pp. 163–94 (p. 163), as quoted in Wendy Moss and Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws*, BP-175E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, Nov. 1991, http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm#; and Malcolm Montgomery, "The Six Nations Indians and the Macdonald Franchise," *Ontario History*, Vol. 57, No. 1, March 1965, p. 175, as quoted in Moss and Gardner-O'Toole (1991).

(7) John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2nd ed., Indian and Northern Affairs Canada, Ottawa, 1978; and Bartlett (1980), p. 163.

white neighbours, is yet but a glimmer and distant spark."[8] Special laws were made to ensure that the "progress" of Aboriginal peoples and their absorption into colonial society was directed by the government in accordance with its policies.

Many of the laws that applied to Aboriginal peoples significantly encroached on what are now understood as their human and civil rights. Attempts were made to abolish all aspects of Aboriginal cultures that were seen as incompatible with Euro-Canadian culture. Laws became stricter when the government was not able to "assimilate" Aboriginal peoples as it had hoped.[9] For example, many Aboriginal ceremonies, festivals, and dances that were important social conventions to the Aboriginal peoples who practised them were seen as threats to Christian values and were made criminal offences.[10] Participating in, assisting, or encouraging such customs was a misdemeanour offence and punishable by imprisonment.[11] Some of these laws remained in existence as late as 1951. Arrests were made and ceremonial items seized.[12] Slow progress in the civilizing program was attributed to the "apathy" and "unsettled habits" of Aboriginal peoples, rather than to any shortcomings in the civilization policy or its administration.[13] This desire to expediently "civilize" and "assimilate" the Aboriginal population, whether motivated by good intentions or not, was what inspired the Indian Residential Schools system.

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(8) John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department*, Indian Affairs and Northern Development, Ottawa, 1985, as quoted in Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 9.

(9) Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 9.

(10) National Archives of Canada, Record Group 10 [NAC RG10], Vol. 3669, file 10,691, Gilbert M. Sproat, joint federal-provincial appointee to the British Columbia Indian Reserve Commission, to the Superintendent General of Indian Affairs, 27 October 1879, quoted in Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast*, Douglas & McIntyre, Vancouver, 1990, p. 15, as quoted in Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 9.

(11) *An Act to further amend "The Indian Act, 1880,"* S.C. 1884, c. 27; and Moss and Gardner-O'Toole (1991).

(12) House of Commons, *Report of the Special Committee on Indian Self-Government*, Ottawa, 1983, p. 13, as quoted in Moss and Gardner-O'Toole (1991).

(13) Interim Report, Richard Pennefather to Governor General Sir Edmund Head, *Parliamentary Papers*, quoted in Leslie (1985), p. 138, as quoted in Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 9.

B. Conditions at the Schools

Though Aboriginal Canadians had attended Christian residential schools since the 17th century, the Indian Residential Schools system was formalized by the government only in the mid-19th century. A number of government-sponsored commissions had recommended solutions to assist with the assimilation of the Aboriginal population and urged that youth education was the key. The 1844 Bagot Commission first recommended that boarding schools (or "industrial schools") be created and funded by the government and maintained by religious organizations to teach, train and "civilize" the Indian peoples.(14) Some Aboriginal leaders had in fact asked the government to assist in educating their youth and to teach them agricultural practices. For instance, when the buffalo population was decimated on the Prairies, some First Nations communities knew that they could no longer rely on their traditional livelihood and negotiated promises of education in their treaties with the Government of Canada.

From 1892 to 1969, the federal government and the Roman Catholic Church, the Church of England (Anglican Church), the Methodist Church (United Church), and the Presbyterian Church entered into formal agreements for the education of Aboriginal Canadians. As mentioned earlier, several Indian Residential Schools continued to operate with government support into the 1990s.(15) In 1920, attendance at residential schools became compulsory under the *Indian Act*. Children aged 6 to 15 could be forcibly removed from their families if they were not sent willingly. Most students would have little or no contact with their families for the full 10 months of the school year, and some would rarely see their families at all due to the distance from the schools to their homes. Many parent-child relationships were completely severed. Many students then returned to their communities as victims of abuse and perpetuated a cycle of violence. They were also expected to raise their own children when they had little experience learning parenting skills from their own families. Thus, the impact of the Indian Residential Schools has been felt by subsequent generations.(16)

At residential schools, students were prohibited from speaking Aboriginal languages or practising their cultures, both in and out of the classroom setting. Students were often physically punished or humiliated if they were found to be speaking their native language

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(14) Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 9.

(15) For example, Gordon's Indian Residential School remained open in Saskatchewan until 1996.

(16) Office of the Prime Minister (2008).

or to be practising their traditional faiths. These measures led to a drastic decline of Aboriginal languages in Canada, and many of those that remain are not expected to survive much longer as the only fluent speakers in some communities are elders.(17)

Many of the schools were overcrowded and critically underfunded, leading to poor heating, sanitation and clothing, as well as high levels of malnutrition and exposure to contagious diseases. Reports to the government in the earlier part of the 20th century noted that there was a crisis in the state of these schools and a high death rate among students – in some cases, the rate was reported to be as high as 50%.(18)

In contrast to the grim stories of life at the schools, positive experiences have also been told in public involving former Indian Residential Schools students who have since become successful in their own right, teachers who helped their students, and church organizations that continue to thrive in Aboriginal communities.(19) The Commission is mandated to "create as complete an historical record as possible," meaning that it should review the "unique" nature of all different types of personal accounts.(20)

The 1996 Royal Commission on Aboriginal Peoples found that Canada had much work to do to mend its relationship with Aboriginal peoples and to end the poverty and violence that continue to affect the communities of many Indian Residential Schools survivors. The Commission's report identified the Indian Residential Schools system as a "failed policy" that had adverse effects on Aboriginal communities still being felt today.(21) Prime Minister Harper stated in the government's official apology that it is now recognized that the entire policy of

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(17) Canadian Heritage, *Aboriginal Languages Initiative (ALI) Evaluation: Final Report*, 26 February 2003, p. 3, http://dsp-psd.pwgsc.gc.ca/Collection/CH34-12-2003E.pdf.

(18) National Archives of Canada, Indian Affairs records, Vol. 6001, file 1-1-1(1), MR C 8134, Memorandum for A. Meighen from D.C. Scott, January 1918, as cited in Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 10.

(19) See, for example, "Contemporary Role Models," *Where are the Children? Healing the Legacy of the Residential Schools*, http://www.wherearethechildren.ca/en/models.html; "Remarkable teacher," *Professionally Speaking*, Dec. 2004, http://www.oct.ca/publications/professionally_speaking/december_2004/remarkable.asp; and Solange de Santis, "A moment of grace for a former principal," 1 May 2005, *Anglican Journal*, http://www.anglicanjournal.com/issues/2005/131/may/05/article/a-moment-of-grace-for-a-former-principal/?cHash=91c2fdec92.

(20) Indian Residential Schools Settlement – Official Court Website (2008), pp. 2, 5.

(21) Royal Commission on Aboriginal Peoples (1996), Vol. 1, Chap. 10.

assimilation as administered through the Indian Residential Schools system "was wrong, has caused great harm, and has no place in our country."(22)

THE CASE IN SUPPORT OF A TRUTH COMMISSION FOR INDIAN RESIDENTIAL SCHOOLS

Much has already been written and published about Indian Residential Schools and many survivors have shared their stories publicly. Organizations such as the Aboriginal Healing Foundation and the Indian Residential Schools Survivor Society have been collecting personal stories and archiving documents. Given that there already seems to be a momentum for story-telling and disseminating information about the Indian Residential Schools system, some observers have questioned whether it is necessary to add a truth commission to the many initiatives responding to the legacy of the Indian Residential Schools and whether the Commission can learn anything new by collecting more survivor stories.

Truth commissions in other jurisdictions have demonstrated that they can contribute to reconciliation and national healing, even if they cannot guarantee these results.(23) For many survivors of traumatic experiences caused by state governments, by a particular ethnic group, or by civil wars, the process of having their own account made public and officially acknowledged has assisted them in healing. South Africa's Truth and Reconciliation Commission is generally accepted as having been successful in assisting reconciliation and providing a model for other countries to follow – even if there have also been many criticisms of the commission and its proceedings. It was established after the Apartheid system of racial segregation came to an end, when there was a real fear that widespread violence might break out amongst the divided political and ethnic factions in the country. Some observers have concluded that the South African commission helped all South Africans come to see Apartheid as a crime against humanity, and also that crimes were committed on both sides of the conflict. This in turn assisted the relations between opposing factions.(24) The South African commission was

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(22) Office of the Prime Minister (2008).

(23) Beth Rushton, "Truth and Reconciliation? The Experience of Truth Commissions," *Australian Journal of International Affairs*, Vol. 60, March 2006, pp. 125–41 (p. 137).

(24) Marites N. Sison, "Canadians urged to 'buy in' to truth and reconciliation process," *Anglican Journal*, 3 October 2008, http://www.anglicanjournal.com/canada/residential-schools/004/article/canadians-urged-to-buy-in-to-truth-and-reconciliation-process/?cHash=f50a4e1b9e.

designed to help with the psychological healing process for the victims of Apartheid, and much has been written about some of the success stories of this endeavour. It also achieved a wide national audience by engaging the press and promoting its activities on national television.(25)

The Indian Residential Schools Truth and Reconciliation Commission is unique among truth commissions in having been negotiated through the court system. The Indian Residential Schools Settlement Agreement, as it is formally known, has served to settle thousands of lawsuits made against (and that could still be made against) the Canadian government and church organizations by Indian Residential Schools survivors. In 2002, the government reported that more than 12,000 individuals had made claims for compensation against the government for sexual and physical abuse, 70% of whom had also claimed against a church organization. At that time, only approximately 560 settlements had been reached and 12 court judgments had been delivered.(26)

Court proceedings can be very long and expensive for all parties involved. As writers Brian Rice and Anna Snyder have noted: "courts are not designed to heal broken relationships within society."(27) In *Blackwater* v. *Plint*, a residential school sexual assault case, Justice Brenner of the Supreme Court of British Columbia acknowledged these types of trials require that plaintiffs "dredge up from the distant past memories of extremely unhappy and traumatic events. This is so notwithstanding the fact that most have spent the better part of a lifetime trying to put these sad memories behind them."(28) As set out in further detail below, the financial compensation available to Indian Residential Schools survivors through the Indian Residential Schools Settlement Agreement represents part of a negotiated alternative to the court process and the costs of litigation. The final settlement package consists not simply of the payment of money to survivors, therefore, but also of the government's commitment to the truth commission process.

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(25) Mariclaire Acosta, "CANADA: Righting Wrongs Through Truth," International Center for Transitional Justice, 9 June 2008, http://ictj.org/en/news/features/1733.html; and Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, Routledge, New York, 2001, p. 42.

(26) Indian and Northern Affairs Canada, "Resolution framework to resolve Indian Residential Schools Claims," http://www.ainc-inac.gc.ca/ai/rqpi/info/nwz/2002/20021212_is-eng.asp.

(27) Brian Rice and Anna Snyder, "Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada," in Marlene Brant Castellano, Linda Archibald and Mike DeGagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, Aboriginal Healing Foundation, Ottawa, 2008, p. 45.

(28) *Blackwater* v. *Plint* (2001), 93 B.C.L.R. (3d) 228 (B.C.S.C.).

The Commission may also prove to be helpful since much of the history of the Indian Residential Schools is so grave and difficult to accept. Many personal stories published in print or posted on the Internet by Indian Residential Schools survivors detail physical, emotional and sexual abuse, much of which can be disturbing for readers. However, actually sharing stories in a supportive setting can lead to healing, whereas suppressing personal stories can lead to anxiety, stress, and depression. The general psychotherapeutic value and restorative power of story-telling for survivors is well documented, though these assumptions continue to be debated and reviewed, particularly in the field of transitional justice.(29) Telling survivor stories in public, or adding them to a public record, can provide the teller with a sense of belonging to a greater narrative: a collective, progressive history. Of course, healing cannot be fully achieved through story-telling alone, and working through past trauma will likely form part of longer healing processes. In her critical evaluation of the South African commission, Lyn S. Graybill, among other commentators, stresses the importance of not overestimating the healing power of story-telling, as post-traumatic feelings and a sense of despondency may return for many survivors. Story-telling may itself prove to be exhausting, open up many difficult issues, or even be "re-traumatizing."(30)

As acknowledged in the government's apology, the "legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today."(31) The Commission's work is therefore expected to contribute not only to the healing of individual survivors but also to the work being done to address many contemporary problems that still exist within Aboriginal communities. Residential school experiences have been linked to other social and psychological problems involving alcoholism, drug abuse, depression, suicide, prostitution, gambling, homelessness, sexual abuse, violence, poverty, lack of parenting skills, and lack of a capacity to sustain healthy families and communities.(32) The loss of lands, traditions and language also forms part of the Indian Residential Schools legacy for many Aboriginal peoples. The Commission may choose to examine these issues as it interprets its

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(29) See, for example, Lyn S. Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?*, Lynne Rienner Publishers, Inc., Boulder, Colorado, 2002, pp. 81–92.

(30) Graybill (2002), p. 83.

(31) Office of the Prime Minister (2008).

(32) Aboriginal Healing Foundation, *2007 Annual Report*, http://www.ahf.ca/pages/download/28_13343, p. 10. See also Beverley Jacobs and Andrea J. Williams, "Legacy of Residential Schools: Missing and Murdered Aboriginal Women," in Castellano, Archibald and DeGagné (2008), p. 126.

mandate of reporting on the history, effects, consequences and the "ongoing legacy" of the residential schools.(33)

THE INDIAN RESIDENTIAL SCHOOLS TRUTH AND RECONCILIATION COMMISSION

A. Creation of the Commission

In 2006, a negotiated legal settlement – the Indian Residential Schools Settlement Agreement – was reached between the federal government, representatives of former students at residential schools, the Assembly of First Nations, Inuit representatives and several church organizations. It was endorsed by the provincial courts that had been hearing the Indian Residential Schools survivors' claims against the government and church organizations. The Agreement is final and binding on all defendants and on those residential school survivors who have opted in to this settlement. The settlement includes a commitment by the government to establish the Commission.

The Commission officially began working on its five-year mandate on 1 June 2008, but the work was delayed by the resignation of the three commissioners originally appointed to the Commission: Chairperson Justice Harry S. LaForme, Claudette Dumont-Smith and Jane Brewin Morley. On 10 June 2009, the Commission announced that it was welcoming the appointment of the Honourable Justice Murray Sinclair as chairperson and Marie Wilson and Chief Wilton Littlechild as commissioners. It also announced its intention to resume its mandate activities as soon as possible.(34)

The Indian Residential Schools Settlement Agreement provides a financial compensation package of at least $1.9 billion for "common experience" payments to former students who lived at one of the schools. Former students who opted in will receive individual payments from this fund, and those who did not may continue to pursue lawsuits on their own. $10,000 will be given to former students for the first year that they attended and $3,000 for each school year that followed. Additional payments may be made to former students who suffered sexual or serious physical abuses, or other abuses that caused serious psychological harm. Payments in the range of $5,000 to $275,000 have been anticipated for each claimant.(35)

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(33) Residential Schools Settlement – Official Court Website (2008).

(34) Ibid.

(35) Ibid.

The Settlement Agreement also includes commitments to fund other projects, including the Commission, a commemoration initiative for the healing and reconciliation of former Indian Residential Schools students and their families, the Aboriginal Healing Foundation, and other health support programs.(36)

B. Mandate and Powers of the Commission

The Commission's terms of reference and its goals, duties, and responsibilities are contained in the Indian Residential Schools Settlement Agreement. Few details are provided about the Commission's expected research methodology, its public engagement process, and its internal governance, which leaves these items to be determined presumably by the Commission members (i.e., the commissioners).

The primary responsibilities of the Commission may be summarized as follows:

- To acknowledge Indian Residential Schools experiences, impacts and consequences;
- To provide a holistic, culturally appropriate and safe setting for persons who come forward;
- To promote and facilitate a number of public truth and reconciliation events;
- To promote awareness and public education concerning Indian Residential Schools;
- To create an historical record;
- To produce a report and recommendations; and
- To support commemoration of former students and their families.

The Commission's activities will primarily consist of collecting historical information, evidence, bibliographies, and oral and written statements from former students and their families (which may be given in confidence). The Government of Canada and church organizations involved are obligated to provide copies of all relevant documents to the Commission to ensure it can complete its work and analysis effectively.

The Commission is not permitted to "hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process." Unlike commissions of inquiry, which often have

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(36) Ibid.; and Indian and Northern Affairs Canada, "Overview of the Resolution Sector," http://www.ainc-inac.gc.ca/rqpi/index-eng.asp. Funding under the Agreement includes $125 million for healing; $60 million to research, document, and preserve the experiences of the survivors; and $20 million for national and community commemorative projects.

the power to summon witnesses and require the production of documents, the Commission will not possess any powers to subpoena people or to compel attendance at any of its activities or events. Participation is entirely voluntary, and this voluntary aspect of the Commission is to remain a central principle as the Commission exercises its mandate. Those who worked at the schools and were involved with their administration are encouraged to come forward as much as those who attended or whose family members attended.

The Commission cannot make any reference or recommendations with regards to possible criminal or civil liability of any person, nor can the Commission make reference to any misconduct by any person unless this information has been established in legal proceedings or by the person's own public admission. Similarly, all names of persons or statements made by persons shall not be used without their expressed consent. Sessions may be held behind closed doors; if names or other identifying details are to be used, then the session *must* be closed.

The Commission is required to establish a research centre and to ensure the preservation of its archives, to prepare a report, and to evaluate proposals for the commemoration of the Indian Residential Schools. It is to coordinate with other Indian Residential Schools initiatives that promote the goal of reconciliation. It is also expected to engage and educate the public through events and activities, to provide a forum for former Indian Residential Schools students to share their stories, and to promote and develop reconciliation practices.

The Settlement Agreement creates the Commission as a completely independent body, with one chairperson and two commissioners. Only one of the three members needs to be an Aboriginal person. The limit to three members means that not all groups affected by the Indian Residential Schools history will be represented on the Commission itself; however, an Indian Residential School Survivor Committee will be created under the terms of reference to assist the Commission. Its representation will be drawn from various Aboriginal organizations and the majority shall be former Indian Residential Schools students.

C. Establishing "Truth"

The concept of the "truth" raises practical questions about how to weigh evidence and witness testimony to establish whether information may be considered "true." In the context of transitional justice, "truth" is most often used to signify "facts": especially facts that have been previously obscured or misrepresented and that a commission must find and make public.

In her review of numerous commissions, Beth Rushton has warned that the "limitations of a truth commission to achieve a complete and accurate record of the past must be acknowledged."(37) A commission can comment only on the documents it has seen and the testimonies it has heard.

The terms of reference for the Commission do not indicate what standard of proof it must apply to determine the "facts," leaving it to the commissioners to determine the methods and procedures that "it deems necessary to achieve its goals."(38) Commissions in other jurisdictions have accepted facts presented to them based on differing standards of proof. Some, such as the El Salvadoran commission, required a minimum of two credible and independent sources as confirmation of a fact. The South African commission, in contrast, "required only one source, both for corroborating victims' accounts and for deciding the culpability of perpetrators, provided the source was sufficiently compelling."(39) Patricia Hayner, whose work on transitional justice has been extensively relied upon by many commissions, has suggested that "the emerging standard for commissions is to rely on a 'balance of probabilities' standard (in some countries called preponderance of evidence), which means that there is more evidence to show something to be true than not to be true."(40)

D. Achieving Reconciliation

While the Commission will ultimately present a report setting out its results in finding the "truth," it can only hope to provide the basis for reconciliation: it cannot actually achieve this goal on its own. As the Settlement Agreement itself notes, reconciliation will "require commitment from all those affected," including former students and their families and communities, the religious and government institutions involved in administering the schools, as well as "the people of Canada."(41) Various commissions have defined reconciliation in their

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(37) Rushton (2006), p. 130.

(38) Indian Residential Schools Settlement – Official Court Website (2008), p. 4.

(39) Hayner (2001), p. 130.

(40) Ibid., p. 131.

(41) Indian Residential Schools Settlement – Official Court Website (2008), p. 1.

own way, but a common theme is that reconciliation refers to a new relationship between the parties concerned that emerges as a consequence of the commission and the truth it has reported on.(42)

Commentators, public figures, and public interest groups (including advocacy groups for Aboriginal peoples, Indian Residential Schools survivors, and also church organizations) have already been weighing in for some time on what they see as necessary for reconciliation in Canada. Some have discussed the particular challenges of getting Canadians involved in the process of reconciliation; in particular, it has been noted that since the Indian Residential Schools were sanctioned by the government and national churches, a large part of Canadian society is in some way implicated in the situation and there may be a general reluctance to get involved, to self-criticize, or to acknowledge the harms inflicted on former students.(43)

A number of commentators have argued that reconciliation will come only from a commitment to addressing the unresolved social issues that have stemmed from the Indian Residential Schools legacy. As Professor Christian Nadeau has asked: "How is the TRC's work going to matter if it doesn't lead to socio-economic and political change for the aboriginal population?"(44) Rupert Ross has written that sociological studies, such as looking at how children placed in violent situations begin to adopt violent behaviour, are necessary and will benefit the truth-telling process and assist in reconciliation.(45) Rice and Snyder advocate that "validation of Aboriginal culture, language, identity, and healing processes must be central to healing and reconciliation methods"; they add that incorporating Aboriginal healing practices into the Commission would "validate the rich cultural experience and identities of Aboriginal people and facilitate the reconciliation process."(46) As other observers have emphasized, they argue that the truth and reconciliation process must be "made public and visibly led by national political and religious leaders" if it is to have a "national impact."(47) The Guatemalan experience with truth and reconciliation revealed that a commission will struggle in getting its

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(42) Rushton (2006), p. 138.

(43) See, for example, Sison (2008).

(44) Christian Nadeau, as quoted in Sison (2008).

(45) Rupert Ross, "Telling Truths and Seeking Reconciliation: Exploring the Challenges," in Castellano, Archibald and DeGagné (2008), p. 148.

(46) Rice and Snyder, in Castellano, Archibald and DeGagné (2008), pp. 56, 58.

(47) Ibid., p. 57.

desired results if it is not supported by the religious and advocacy groups with which the local population has found support in the past.(48)

TRUTH AND RECONCILIATION COMMISSIONS IN OTHER JURISDICTIONS

Depending on how liberally these terms are applied, there have been around 20 "truth commissions," "truth and reconciliation commissions," or similar transitional justice commissions in other countries; most of these were conducted in the past 20 years, and most in South America and Africa. They offer much experience concerning the potential challenges, successes and failures of truth commissions. While a thorough review of these commissions and the commentary written about them is beyond the scope of this paper, a few pertinent themes are reviewed in this section.

Truth commissions have generally been established to assist with transfers of political power and popular demands for democratic reform, to reinforce human rights protections and to promote criminal justice. If the goal is to use the truth that is found to help reconcile two or more opposed groups, then it will be referred to as a truth "and reconciliation" commission. Various commentators have identified the different types of situations out of which a need for a truth commission has arisen, including: after the fall of authoritarian regimes, such as in certain Central American countries, Chile, or Argentina; after incidents of gross physical violence or genocide, such as in the former Yugoslavia or central Africa; and in settler societies, where indigenous peoples were displaced from their land, disenfranchised, and subjected to racist policies, such as in South Africa.(49)

All truth commissions have been unique in terms of their context and mandate. Some have not been entirely successful in achieving their goals, and have been fraught with challenges, setbacks, and problems. Some have been too limited to form a full and fair accounting of the past, whether restricted by their mandate, by their limited access to information, or by other political constraints.(50) Others have been seen as assisting in the

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(48) Mark Freeman and Priscilla Hayner, "Truth-Telling," in David Bloomfield, Teresa Barnes and Luc Huyse, eds., *Reconciliation after Violent Conflict: A Handbook*, International IDEA, Bulls Tryckeri AB Halmstad, Stockholm, 2003, p. 143, http://www.idea.int/publications/reconciliation/.

(49) Trudy Govier, *Taking Wrongs Seriously: Acknowledgment, Reconciliation, and the Politics of Sustainable Peace*, Humanity Books, Amherst, NY, 2006, as quoted by Rice and Snyder in Castellano, Archibald and DeGagné. (2008), pp. 48–49.

(50) Priscilla Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study," *Human Rights Quarterly*, Vol. 16, Issue 4, 1994, p. 600.

healing of persons affected by human rights abuses and in moving adversarial groups closer to reconciliation.

Most truth commissions' primary purpose has been to uncover truths that have otherwise remained concealed, forgotten, or insufficiently acknowledged. They then seek to understand these truths and discover how and why certain events happened so as to prevent them from happening again. Truth commissions are generally temporary bodies, lasting for only a few years. They are independent from the established justice system and are given varying degrees of the powers normally granted to courts (such as the calling of witnesses, access to documents, granting amnesties, etc.). They generally investigate patterns of abuses, violations of human rights, and humanitarian norms during a determined period in a nation's history. They usually complete their mandate with a final report that contains conclusions and recommendations to the government for further action.(51)

Recognizing that a commission cannot serve the same function as traditional courts, Salomon Lerner, the president of Peru's Truth and Reconciliation Commission, stated that truth commissions are "not judicial bodies, but mainly moral ones."(52) Truth commissions have been described as a means for a nation to "establish a moral account" of its own historical record.(53) By creating a sense of moral renewal that marks a break from the past, a country can move towards healing and reconciling the divisions that are preventing national unity. A task force that explored the option of creating a truth commission in Kenya articulated these hopes for change that may be brought about by a truth commission:

> [Truth commissions] can act as a sort of a national catharsis in which the country goes through a deep and penetrating process of cleansing the past. This function is akin to therapy. It can perform the function of moral reconstruction, in which a country takes stock of its morality in politics, governance, cultural values, and its view of humanity.(54)

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(51) Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, Government Printer, Nairobi, 2003, pp. 135–37, http://www.scribd.com/doc/2584255/Kenya-Report-of-the-Task-Force-on-the-Establishment-of-a-Truth-Justice-and-Reconciliation-Commission-August-26th-2003.

(52) Salomon Lerner, "Truth Commission: The Task to Make Justice," Presentation by the President of the Truth and Reconciliation Commission at the Embassy of Peru in London, UK, 15 February 2002, www.gci275.com/peru/lerner_reconciliation.shtml.

(53) Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003), p. 24.

(54) Ibid.

Many commentators have argued that, to be effective, a truth commission must take a broad approach in considering the needs of the victims of the events under review – not simply addressing those needs during the commission's proceedings, but also exploring how to help the victims to heal and become equal, participating members of society. It will be difficult to help these victims if the wrongs that were perpetrated against them remain unacknowledged by the perpetrators, by those who benefited from the events under review, or by those who hold political power. Truth commissions usually therefore issue a report and recommendations to the government on how ultimately to achieve reconciliation between adverse groups, and between victims and perpetrators.

A. Terms of Reference of Truth Commissions

The findings and recommendations made by a truth commission may be largely predetermined by its terms of reference and its mandate. If a commission is designed to focus on certain types of events or abuses, then the "truth" it presents will be limited to the evidence and testimonies that fall within such categories. Information relevant to the reconciliation process may then be missed if it falls outside the parameters of a commission's terms. For example, truth commissions that have focussed on missing persons were not able to report on other abuses committed by past political regimes, and therefore did not present as complete an account of the period under review as might have been possible. A flexible mandate may allow a commission to include more relevant information. The El Salvador truth commission's mandate was to report on "serious acts of violence … whose impact on society urgently demands that the public should know the truth."(55) This broad mandate allowed the commission to report on those events and incidents that it felt best illustrated the "truth" that should be made public. As Patricia Hayner has commented: "A truth commission's mandate must not exclude abuses that represent a large portion of the victims' experiences."(56)

B. Commissioners of Truth Commissions

The choice of who will sit on a commission is often a highly sensitive and politically charged issue. In South Africa, Archbishop Desmond Tutu was selected to head its

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(55) Hayner (2001), p. 637, quoting from *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, UN Security Council, U.N. Doc. 2/255000, 1993, p. 18.

(56) Hayner (2001), p. 616.

truth and reconciliation commission due to his high profile and respected reputation across the various dividing lines within the country. In the case of the Commission on the Truth for El Salvador, no Salvadorans were commissioners due to neutrality concerns after years of division caused by civil war.(57) Other commissions and international criminal tribunals have had a mix of international representation to promote a sense of objectivity. To be seen as objective, a commission should be impartial, unbiased and independent from government. As Hayner has commented, a minimum requirement is that the commission be free from political pressures.(58)

C. Powers of Truth Commissions

Various commentators have reviewed the powers given to truth commissions and how these need to be tailored to the goals they are designed to achieve. Generally, commissions need to be able to investigate all available pertinent sources and documents and to interview witnesses with relevant knowledge. Various commissions have been granted powers of subpoena, search and seizure powers, powers to grant amnesties, and witness protection powers. Most truth commissions are not, however, mandated to play an active role in determining whether individuals should be prosecuted or whether amnesties should be granted, though some have made recommendations in their reports or forwarded information on to courts.(59) The more judicial powers are given to a truth commission, the more it will appear as a court of law and risk defeating the purpose of an alternative justice initiative.(60) The Canadian Commission has been given very few of what might be considered "judicial powers." It will have no special powers to summon witnesses or to search property.

D. Rights of the Accused and of Victims

For a truth commission to gain national and international respect, it must be seen not only to be objective, but also to respect the rights of the accused and the rights of victims. Though a truth commission is not a court and therefore does not pass sentence on those accused of crimes and violations, it may still pass judgment when it publishes its recommendations and

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(57) Hayner (1994), p. 628.

(58) Ibid., p. 652.

(59) Ibid., p. 604.

(60) Freeman and Hayner (2003), pp. 131–32.

conclusions (and the public may pass its own judgments as well). The degree to which proceedings and testimonies should be made in public or private is an important question for truth commissions.

As noted above, the Canadian Commission will name persons, or permit their names to be mentioned in public, only if their criminal guilt has been proven in court. Other commissions have taken different approaches. Some have named alleged perpetrators, although that was proven to have dangerous consequences in Rwanda when two alleged perpetrators were killed in the months that followed a commission reporting on their crimes.(61) On the other hand, if names are to be censored and only to be mentioned behind closed doors, then some commentators have argued that there will be an imposed limitation on the "truth" being told: the story may be incomplete without certain key figures being made known. Assuring privacy for witnesses may protect their rights, whether victims or accused persons, while encouraging them to come forward with less fear of reprisal. On the other hand, public proceedings may help ensure openness and allow observers to form their own opinions on the proceedings without waiting for the final report; this, in turn, may allow for the emergence of what transitional justice experts Mark Freeman and Priscilla Hayner have referred to as "an authentic national discourse about the past."(62)

E. After a Truth Commission Is Completed

When reviewing the lessons from previous truth commissions, the Kenyan task force recognized that the need for reconciliation and healing continues even after the commission has completed its mandate. It stated in its report that: "The truth commission process is never the end. It is important therefore for the commission to think about post-commission processes that would complete what it started."(63) As noted above, not all truth commissions have been successful, and some commission reports have been ignored by governments.(64)

Some truth commissions, such as Sierra Leone's, did incorporate a follow-up process into the commission's initial mandate. Chile recommended that a second commission be

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(61) Hayner (1994), p. 648.

(62) Freeman and Hayner (2003), p. 134.

(63) Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003), p. 118.

(64) Hayner (1994), p. 608.

designed to follow up on the work of the first. Guatemala's Historical Clarification Commission lacked any follow-up procedures; accordingly, very few of its recommendations were implemented by the Guatemalan government, which afterwards continued to be criticized for its human rights record.(65)

Canada's situation is unique in that many of the support programs that will assist residential schools survivors are already in place and funding is set aside in the Settlement Agreement for healing, such as the funding for the Aboriginal Healing Foundation and the Indian Residential Schools research centre and archives. The Commission is mandated to make further recommendations concerning reconciliation; at that time, the responsibility will fall on Canadians and our government to determine how to respond.

CONCLUSION

Canada's truth and reconciliation commission has the potential to engage the country and become a significant part of our history. The Commission is commencing its work amid high public expectations, and many individuals and organizations are eager for the truth and reconciliation process to proceed. Other countries will certainly study the Commission to see whether Canada has set an example for them to follow.

There is much at stake, but there is also much to be gained. The Commission has an opportunity to show the rest of Canada how the wounds left by the legacy of Indian Residential Schools can be healed. As writer Rupert Ross concluded after reviewing recent success stories about healing told by groups of Aboriginal peoples: "we are not without the knowledge of how to turn things around. What is needed, from all of us, is the will."(66)

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(65) Ibid., p. 615.

(66) Ross, as quoted in Castellano, Archibald and DeGagné. (2008), p. 159.